United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B p/s

Nos. 74-1584, 74-1636

In the

United States Court of Appeals

For the Second Circuit

SCIENTIFIC HOLDING COMPANY, LTD., AN ILLINOIS CORPORATION,

Plaintiff-Appellant,

vs.

PLESSEY INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellee.

BRIEF OF APPELLANT, SCIENTIFIC HOLDING COMPANY, LTD.

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THE NATURE OF THIS APPEAL.

Plaintiff-Appellant, Scientific Holding Company, Ltd., appeals from the action of Judge Dudley Bonsal in directing a verdict in favor of defendant as to the validity of the March 2 amendments to the contract in suit. Appellant further appeals from the judgment entered on the jury's verdicts against plaintiff on special interrogatories Nos. 1, 2 and 4 on the ground that the verdicts are contrary to the weight of the evidence. In addition, plaintiff appeals from the taxation of costs against it in the amount of $3,481.40. Defendant-appellee, Plessey Incorporated, has cross-appealed from the judgment entered on the jury's verdict against defendant on its counterclaim.

ISSUES PRESENTED FOR REVIEW.

1. Whether the District Court erred in directing a verdict against plaintiff as to the issue of the validity of the March 2 amendments to the contract in suit when the evidence clearly presented a question of fact for the jury as to the validity of those amendments.

2. Whether the jury verdicts against plaintiff on special interrogatories Nos. 1, 2 and 4 are contrary to the weight of the evidence.

STATEMENT OF THE CASE.

This litigation arises out of the sale of plaintiff's business to defendant Plessey, a multinational corporation headquartered in England. Plaintiff is the successor to International Scientific Ltd. (ISL) a Barbados company organized and owned by a number of U. S. citizens. ISL employed approximately 500 employees, and was engaged in the manufacture and assembly of core memory products, the assembly of printed circuit boards, the manufacture of cable harness assemblies, and other electronic and electro-mechanical assemblies, which products were sold to the U. S. computer and peripheral equipment industry.

Negotiations began in December, 1969 and Plessey personnel made several trips to Barbados to examine plaintiff's books and operations. Plessey had complete access to all ISL books and records (PX 10, PX 11).

The contract of sale, entered into on February 4, 1970, provided for an initial payment at closing of $180,000 and a further payment, not to exceed $1,260,000, conditioned upon earnings during a measuring year (April, 1970 to March 31, 1971). It further provided for the infusion into ISL of at least $600,000 by Plessey for operating capital. The earn-out formula called for payment of 3.5 dollars for each dollar's profit until profits reached $360,000 or more. The maximum earn-out would be $1.26 million. If ISL earned only $200,000, the additional payment would be $700,000.

The initial draft of agreement provided Plessey would manage the business during the measuring year (PX 1). At plaintiff's insistence the contract was modified to provide that ISL management would manage the business during the measuring year and that such management "shall have the maximum freedom to operate the business in a manner which will produce,

in the judgment of such management, the maximum profit available" (PX 3, Par. 5(d)). Notwithstanding this provision, if ISL management failed to attain *average* monthly profits of $15,000 *commencing* with the month of June, 1970, then Plessey had the option of assuming management responsibility. In that event, Plessey was expressly obligated to continue to operate the business during the measuring year in good faith (PX 3).

At the closing on March 2, 1970, Plessey, knowing that plaintiff would not be able to meet its obligations and continue its business without the $600,000 infusion of capital called for in the contract of sale, refused to close unless ISL agreed to amendments to the contract which provided that ISL management would be required to make $15,000 average monthly profits *commencing in May* rather than June (PX 5) and that ISL pay 10% interest on the $200,000 additional capital to be furnished by Plessey.

At the trial plaintiff contended that the March 2 amendments to the contract were invalid because (1) ISL's president, Kovar, lacked authority to agree to them, (2) there was no consideration to support them, and (3) they were coerced under economic duress. Plaintiff offered testimony and documentary evidence supporting each of these contentions and defendant offered countervailing proof in an attempt to rebut the various claims of invalidity. Notwithstanding the fact that all three issues were fully tried by both sides and conflicting testimony and documentary proof was presented, the trial judge in his charge and special verdict withdrew from the jury the issue of the validity of the March 2 amendments, instructing them that the amendments were valid and thus directed a verdict on this issue. Plaintiff's counsel excepted to the withdrawal of this issue from the jury both before and immediately after the court's charge as required by FRCP rules 49 and 51.

Following the closing, ISL management continued to operate the business. The company lost $28,000 in March and

$10,000 in April, the first month of the measuring year. These losses, however, were not to be deducted from profits in determining whether ISL met the $15,000 *average* monthly profit requirement commencing with May and subsequent months, and in fact, it was contemplated that the business would lose money during these months.

Early in May Plessey officials met with ISL's president, Kovar. They demanded that he relinquish all pricing authority and responsibility to Plessey's Parr and agree to conversion of the Barbados facility into an assembly operation. They also sought Kovar's assent to transfer of engineering design, prototype and customer service and repair functions to a new facility to be established near Boston, Massachusetts. Kovar objected, explaining that compliance would destroy ISL as an integrated business entity, would emasculate his role as general manager, and that the changes sought would necessarily depress profits during the measuring year contrary to the management and profit maximization provisions of the agreement. The changes sought by Plessey were consistent with Plessey's 1969 Matrix Plan—a plan for penetrating the United States memory market which was conceived prior to the acquisition of ISL.

Immediately after Kovar's refusal to assent to the unauthorized takeover, Plessey set in motion plans to remove Kovar and to take over management of ISL. At meetings held in England on May 20 and 22 it was agreed that (1) Plessey's Gretton would be sent to Barbados as manager in charge of operations; (2) all marketing and pricing for the North American market would be under the control of Plessey's Parr; (3) the Barbados production and floor plan layout would be redesigned along the lines of Plessey's Portugal and Malta assembly plants; and (4) plans would be finalized for establishing a service and test facility and sales office at the Boston (Maynard) location. The date of the takeover from Kovar was to be as early in June as possible and Gretton and the Plessey management team involved in the takeover were to be available for movement ef-

fective June 7, 1970, "the intention being for the takeover group to arrive at the Barbados plant the day following dismissal of Allan Kovar" (PX 20).

On June 9, 1970 Plessey advised plaintiff that it was assuming full management responsibility under the agreement *as amended by the March 2 amendment,* on the ground that ISL failed to make profits of $15,000 in May. The actual profit for May was $6,200. Plaintiff protested the takeover and said it would look to Plessey as trustee of its rights and expect it to operate the business so as to maximize profits during the measuring year. Plessey rejected the notion that it was a trustee or had a duty to maximize profits, but acknowledged its obligation to continue the business of ISL in good faith, although it had already begun the evisceration of ISL as an integrated business entity. Plessey thereupon proceeded to implement the plans formulated at the May meetings. A management team was sent to Barbados and the business was restructured as contemplated in Clarke's May 25 memorandum (PX 20) and Plessey's 1969 Matrix Plan (PX 71).

On July 13 a meeting was held between representatives of Plessey and ISL. Plaintiff's director, Carlen, again protested Plessey's assumption of management, and disclaimed Kovar's authority to enter into the March 2 amendment. Carlen demanded on behalf of ISL the right to receive financial statements and operating information in order to evaluate the progress being made under Plessey's management. Plessey's Chairman, Sinsheimer, refused to provide plaintiff with financial statements but said in effect that any claimed breach on Plessey's part was at most a technical one because the maximum payout of $1,260,000 would be easily realized and that therefore plaintiff had nothing to worry about.

Upon assuming management Plessey proceeded to dismantle the Barbados facility and implement the structural and operational changes which Kovar had refused to agree to in May and to integrate the ISL operation into Plessey's world-wide

memory plans. Pricing authority was transfered to Plessey's Parr. A new facility was established at Boston with transfer of functions previously conducted at Barbados to Boston. The Barbados plant was converted to an assembly type operation similar to Plessey's Lisbon and Malta plants. And, importantly, the potentially profitable cable harness assembly work with estimated annual business in excess of $1 million was discontinued entirely. At the end of the measuring year, Plessey advised plaintiff that the business had incurred a substantial loss and that therefore there would be no further payout under the agreement. This action for breach of contract followed. The complaint sought damages for the full balance of the contract price in the amount of $1,260,000.

ARGUMENT.

I.

THE COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF AS TO THE VALIDITY OF THE MARCH 2 AMENDMENT BECAUSE PLAINTIFF'S EVIDENCE PRESENTED A FACT QUESTION AS TO THAT VALIDITY.

Paragraph 5(d) of the February 4, 1970 contract of sale, as amended by agreement of the parties on February 18, 1970 to correct a scrivener's error, provided that Plessey had the option of assuming management control in the event ISL management failed to attain average monthly profits of $15,000 commencing with the third month of the measuring year (June). However, at the closing on March 2 Plessey refused to close unless ISL agreed (1) that it would pay the cost of $200,000 additional capital to be furnished the company by Plessey, and (2) that the monthly averaging provision be changed to require ISL management to average $15,000 monthly profits commencing in May rather than June. Plessey, having enjoyed full access to ISL books and records, knew that ISL could not meet its obligations if the sale were not closed, and using this leverage, coerced ISL representatives into agreeing to the amendment (PX 5).

At the trial plaintiff produced substantial testimony and documentary evidence that the March 2 amendment was invalid because (1) Kovar, ISL's President, had no authority to agree to the amendment without approval of the Board of Directors, (2) the amendment was not supported by consideration, and (3) the amendment was coerced. Despite this evidence, Judge Bonsal withdrew the issue of the validity of the amendment from the jury (Tr. pp. 1684, 1689) and directed the jury that the amendment was valid (Tr. p. 1796).[1]

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1. All page references are to the original transcript.

It is not necessary to dwell upon the legal standard that must be applied by this Court in reviewing direction of a verdict on the ground that plaintiff has failed to raise a sufficient fact issue to go to the jury. The Court is aware that in reviewing a directed verdict in favor of defendant it must view the evidence and all inferences therefrom in a light most favorable to plaintiff. E.g. *Hartel* v. *Long Island R. Co.*, 476 F. 2d 462, 464 (2d Cir., 1973). Moreover, as Judge Learned Hand pointed out in *Ondato* v. *Standard Oil Co.*, 210 F. 2d 233, 236 (2d Cir., 1954):

> ". . . [A]n appellate court in passing upon a directed verdict must assume that the testimony of the witnesses for the losing party was entitled to the full measure of credibility that the most persuasive appearance and behavior in court would add to what they said."

Finally, as Judge Frank held in reversing direction of a verdict for defendant in *Lindeman* v. *Textron, Incorporated*, 229 F. 2d 273, 274 (2d Cir., 1956):

> ". . . [W]e necessarily assume that the jury would have believed all the testimony favorable to plaintiffs, ignored or resolved any inconsistencies in that testimony and disbelieved all testimony adverse to plaintiffs."

In light of the accepted standards of review, the question here is, quite simply, whether plaintiff's evidence, if believed, and afforded the benefit of all inferences, was sufficient to raise a jury issue. We submit that a review of that evidence establishes beyond peradventure that the judge erred in taking the issue from the jury.

A. The Evidence with Respect to Kovar's Lack of Authority.

Plaintiff contended at trial that Kovar, ISL's President, lacked authority to agree to the March 2 amendment. Substantial proof of Kovar's lack of authority was presented to the jury.

1. Documentary Evidence of Kovar's Limited Express Authority.

The documentary evidence establishes that prior to the execution of the contract on February 4, the ISL Board of Directors held a meeting in New York to consider sale of the company to Plessey. It was agreed at that time that the sale would be consummated, subject to shareholder approval, in accordance with the draft contract with certain changes, including insertion of an averaging provision. Plessey agreed to these changes and they were incorporated in the final draft of February 4. With respect to Kovar's authority, the board resolution authorizing the transaction stated "the proper officers of this Corporation are authorized and directed to make such changes in that agreement as *in the opinion of the directors shall* be necessary or appropriate . . ." (Emphasis supplied) (PX 8). In short, all material amendments were required to be approved by the directors, not Kovar.

After execution of the contract on February 4, a special meeting of the stockholders was held on February 14, at which time the sale was approved. The proxy for that meeting specifically stated that current ISL management would retain operating control and *"commencing with the third month of the Measuring Year" (June)* would be required to *average* $15,000 monthly profits (PX 9). Julius Lewis, ISL's attorney, testified that the proxy material was given to Plessey at the March 2 closing (Tr. p. 614). A simple reading of this material was sufficient to put Plessey on notice that Kovar had authority to agree to the sale only as structured in the February 4 contract and that he was without authority to accept materially different terms. The shareholders had approved an averaging provision commencing in June, not May, and Plessey's attorney, Dubin, who had negotiated and written the contract, knew very well that loss of that month was crucial. Moreover, Kovar specifically told Dubin and Plessey's Albert at the closing that he had no authority to agree to a material amendment (Tr. pp. 137, 350).

It is apparent from the board resolution and the proxy material that Kovar's authority was expressly limited or, at the very least, that the jury could have so found. Moreover, the jury could have found that Plessey was put on notice as to that limitation. Judge Bonsal erred in refusing to allow the jury to make those determinations.

2. Kovar's Testimony with Respect to His Lack of Authority.

In addition to the documentary evidence, Kovar himself testified (1) that he did not have authority to agree to the amendment but was coerced into signing, and (2) that he informed Plessey at the closing that he lacked authority.

First, with respect to the extent of his authority, Kovar testified that the board resolution and the proxy material authorized him only to close on the basis of the February 4 contract (Tr. pp. 122-24, 349-55). He repeatedly testified that he lacked authority to agree to the amendment (Tr. pp. 122-24, 349-55, 358).

Second, Kovar testified that he specifically told Plessey at the closing that he lacked authority to sign the amendment but was told by Mr. Dubin, counsel for Plessey, that that was Kovar's problem and unless he signed, the deal was off (Tr. pp. 137, 349-55).

Finally, Kovar testified that when he first told Carlen, an ISL director, of the amendment on June 9, Carlen was "indignant" and informed him he had had no right to agree to such an amendment (Tr. pp. 404, 407, 411, 715).

3. Lewis' Testimony with Respect to Kovar's Authority.

Julius Lewis was the attorney representing ISL at the closing. Lewis testified that Kovar had no authority to agree to the amendment (Tr. p. 576) and that Plessey was specifically told that Kovar lacked the requisite authority (Tr. p. 578). He further testified that it was finally decided that Kovar should

sign only because he had no other choice (Tr. p. 575). Finally, Lewis testified that when Carlen learned of the amendment on June 9, he stated Kovar had no authority to amend the contract of sale (Tr. p. 594).

4. Carlen's Testimony Regarding Kovar's Authority.

Raymond Carlen, President of Ryerson Steel Company, was a member of the ISL Board. Carlen testified that he first was told of the March 2 Amendment on June 9. He stated that he was "shocked" because his understanding based on the February 4 contract was that May results were irrelevant and he would not as a director have agreed to an amendment which required ISL to earn profits in May (Tr. pp. 422-23, 484, 512). Carlen further testified that Kovar had no authority to alter the February 4 agreement (Tr. pp. 430, 500, 515). Moreover, Carlen testified that he met with Sinsheimer, Plessey's President, on July 13 and specifically informed Sinsheimer that Kovar had no authority to amend the contract (Tr. p. 515). Finally, on August 11 Carlen wrote a letter to shareholders wherein he stated that at the meeting with Sinsheimer he notified Sinsheimer that the amendments "were not made with the approval of the shareholders" (PX 31).

The foregoing establishes without question that the jury was presented with substantial evidence, both in terms of quality and quantity, to support plaintiff's contention that the March 2 amendment was invalid because Kovar lacked authority to execute it. Of course, defendant presented evidence to the contrary. But any conflict between that evidence and plaintiff's evidence must be ignored on review of a directed verdict and plaintiff's evidence accepted as true and fully credible. Application of that standard to the evidence presented clearly leads to the conclusion that there was ample evidence to allow the jury to find for plaintiff on the issue of Kovar's lack of authority. It was error to withdraw the issue from the jury.

B. The Evidence with Respect to the Absence of Consideration.

Plaintiff further attacked the validity of the March 2 amendment on the ground that the amendment was not supported by consideration. Plaintiff's position was, quite simply, that Plessey coerced agreement to the March 2 amendment on the strength of its threat not to close unless ISL consented to the amendment. Plessey promised no new performance and surrendered no rights. It simply blackmailed ISL into signing the amendment by refusing to close even though it was obligated to do so.

One of the most fundamental principles of contract law establishes that the doing of an act which a party is already obligated to do cannot constitute consideration for a new promise on the part of the other party. As Professor Williston points out in 1 *Williston On Contracts* (3rd Ed.) § 130, p. 532:

> "' . . . [W]hen a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.'
>
> On principle, the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion, '"It is like carrying coals to Newcastle" to add authorities on a proposition so universally accepted and so inherently just and right in itself.' "

Of course, the principle is firmly imbedded in New York law. 9 N. Y. Jur., Contracts § 97; *Ripley* v. *International Rys. of Cent. Amer.*, 8 N. Y. 2d 441, 209 N. Y. S. 2d 289, 171 N. E.

2d 443 (1960); *Young Foundation Corp.* v. *A. E. O'Haviano, Inc.*, 20 Misc. 2d 302, 216 N. Y. S. 2d 448 (1961).

Plessey contended that it was not required to close because ISL had misrepresented its financial condition in that (1) the December 31, 1969 statement showed ISL had lost approximately $200,000 more for the year than had been anticipated and (2) ISL had incurred operating losses in the months of January and February in excess of "ordinary". Plaintiff's evidence clearly raised fact questions as to both these contentions. Those questions should have been submitted to the jury.

1. The Evidence with Respect to the Alleged Misrepresentations.

The February 4 contract required Plessey to pay ISL shareholders $180,000, and, in addition, to place $600,000 working capital in the business immediately upon closing (PX 3, Par. 5(a)). Plessey's position at trial was that at the closing on March 2, it first learned that ISL had lost $200,000 more in calendar 1969 than had been anticipated and further that in January and February, 1970 ISL had lost $74,000 rather than the $40,000 which the contract provided would be considered "ordinary" losses. Plessey thus contended that ISL had misrepresented its financial condition and Plessey had the right not to close. Plaintiff produced substantial evidence to refute Plessey's claim that it had a right to refuse to close.

First, the evidence demonstrated that there were no representations made as to the amount ISL would lose for the 1969 calendar year and that, therefore, the fact that losses were larger than expected was irrelevant. While Plessey representatives had been shown unaudited financial statements for earlier periods (the latest for November, 1969), there were no representations made as to these statements and there was nothing in the contract relating the December and year end results to the November financials (PX 3, Par. 10 c). The only requirement and representation in the contract was that the December 31, 1969 statement, "to the extent of ISL's knowledge, fully and accur-

ately presents the results of ISL's operations for that period." (PX 3, Par. 10 c(iv)). Plessey made no claim at trial that as of March 2, 1970 it believed that the December 31 statement was inaccurate. Indeed, Lewis testified that Plessey never claimed at the closing that ISL was in violation of any of its contract representations (Tr. p. 565). Rather, Plessey's claim was that the December statement revealed a loss larger than had been anticipated. Lewis stated that at the closing Plessey's position was simply that because of the larger loss, more than $600,000 would be needed in the business (Tr. p. 565). Kovar specifically disputed the need for additional funds and stated that the $600,000 which Plessey was obligated to furnish was all that he required to run the business (Tr. p. 529). Even if Plessey believed additional capital was required, it is clear that ISL was not in breach of its representations under the contract and also that ISL was not demanding further or new performance by Plessey.

Second, the evidence showed that despite Plessey's attempt at trial to justify its alleged right to refuse to close on the ground that $800,000 rather than $600,000 was required to keep the company alive, Plessey's financial vice-president, Albert, admitted on cross-examination that, in fact, only $600,000 was required. That testimony is crucial (Tr. p. 1602):

> "Q. So if we subtracted that $180,000 [the downpayment to ISL owners] from your calculation as to what was necessary as of March 2 when you got, according to your testimony, the final figures for the year 1969, only the $600,000 would be required? Isn't that right?
> A. That is true."

It is apparent from Albert's admission that Plessey's argument that the need for $200,000 additional working capital justified its refusal to close is false. Certainly Albert's admission was, in of itself, sufficient evidence to permit a jury to find that Plessey had no right to refuse to close and that, therefore, the amendment was unsupported by consideration. Albert's admis-

sion combined with the evidence that (1) ISL made no representations in the contract regarding the amount of the 1969 loss and that (2) Kovar, ISL's president and chief operating officer, said the additional $200,000 was not needed, presented a pure jury question.

Third, plaintiff presented evidence from which the jury could have found that Plessey knew about the $200,000 additional loss prior to the closing and was anxious to consummate the transaction in any event. If so, then clearly Plessey's contention that it had a right to refuse to close was a sham and that alleged right could not constitute consideration for the March 2 amendments. PX 111 is a report written by Plessey's Crocker with regard to the purchase of ISL. That report is dated February 25, 1970, one week before the closing. It quite clearly shows that at that time Plessey knew that ISL had lost $400,000 for calendar 1969 rather than the $200,000 amount Plessey claims was anticipated. Sinsheimer and Albert were shown on the distribution list for that report. In addition, PX 110, the minutes of the meeting of the Board of Directors of Plessey held on February 27, 1970, state:

> "(c) *Barbados*
>
> Mr. Frye reported that it was hoped to sign the final Agreement very shortly. *The prospects for Barbados were better than originally envisaged* but it had been necessary to make the following changes in the proposals previously approved by the Board:
>
> (i) the working capital to be immediately provided was now likely to be in the region of $800,000.
>
> (ii) the purchase would now be carried out by Plessey Inc. and not directed by 'Limited' as originally proposed.

These changes were approved." (Emphasis supplied.)
Clearly PX 110 and PX 111 were sufficient to allow the jury to find that Plessey knew of the additional $200,000 loss prior to the closing and that they nevertheless felt that the prospects were "better than originally envisioned."

Finally, with respect to Plessey's misrepresentation argument, the evidence before the jury clearly required it to find that the losses sustained in January and February were not "out of the ordinary" within the meaning of the contract. Paragraph 10 (e) of the contract stated that ISL represented that from December 31, 1969 until closing there would be no material changes in its financial condition but that "*operating losses* not at a rate in excess of Twenty Thousand ($20,000) U. S. Dollars per month . . . shall not constitute an out of the ordinary change . . ." (Emphasis supplied). Plessey contended that ISL lost $74,000 in January and February and that therefore the representation was breached giving Plessey the right to refuse to close.[2] ISL, however, introduced evidence that while losses may have been $74,000, operating losses were only $36,000. The financial statements for January and February (DX R) were introduced. Those statements showed that extraordinary nonoperating expenses of $19,000 for legal and audit fees related to the sale and of $17,000 for special bank charges were included in arriving at the $74,000 loss figure (Tr. p. 340) When those extraordinary expenses are deducted, the operating loss was $36,000 and, hence, the representation was not breached. Indeed, Albert admitted on cross-examination that the $74,000 figure included $36,000 of extraordinary expenses (Tr. p. 1604). Moreover, Sinsheimer, Dubin and Albert each admitted that they did not know what the $74,000 loss figure was comprised of (Tr. pp. 1074, 1318, 1604). Plessey therefore had no right to refuse to close and the March 2 amendment which was extracted based on that alleged right was without consideration. The jury should have been permitted to so find.

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2. It is interesting to note that at the closing neither Dubin or Albert ever suggested that ISL was in breach of its representation regarding monthly losses of $20,000 (Tr. p. 735).

2. The Evidence with Respect to the Lack of Consideration for the Amendment Shortening the Earning Period to "Commencing in May."

The March 2 amendment to the contract also required ISL to average $15,000 monthly profits beginning in May rather than June, as provided in the original contract. It was ISL's position, of course, that this amendment also lacked consideration to support it because it was extorted solely on the basis of Plessey's refusal to close when, in fact, Plessey was already required to close. Plessey contended that the misrepresentations discussed earlier (pp. 14-17) gave it the right not to close and hence both amendments were supported by consideration. The evidence was more than adequate to permit the jury to find that the amendment shortening the period to May was without consideration.

First, the evidence demonstrated that the two March 2 amendments were not negotiated simultaneously but rather that it was not until ISL's agreement to pay interest on the additional $200,000 had been secured that Plessey demanded that earnings begin in May rather than June. Albert admitted this on cross-examination (Tr. p. 1607). The significance of this seriatim approach to the amendments is apparent. Since Plessey's position was that it had a right to refuse to close because of the ISL misrepresentations which required $200,000 additional capital, when ISL agreed to pay for that capital, any claimed default on ISL's part was cured and Plessey was no longer entitled even under its version to refuse to close. Therefore, the second amendment was totally lacking in consideration. This issue should have gone to the jury.

Second, Lewis testified that at the closing Plessey did not purport to rely on the alleged financial misrepresentations to support its demand for shortening the period. Instead, Lewis related that the only reason advanced to justify Plessey's demand was that when the contract was signed on February 4 it was anticipated that the closing would occur late in Febru-

ary. Therefore, the language which required ISL to average $15,000 monthly profits commencing with the third month after closing would have resulted in an averaging period commencing in May. Even though the closing took place in March, thereby making June the third month after closing, Plessey still wanted the period to begin in May (Tr. p. 568). It is obvious, of course, that Plessey was obligated by the contract, and its mere desire to change the month did not provide consideration for demanding the change. Indeed, when the February contract was executed, a March closing date was inserted (Tr. p. 1313). Again, this evidence was sufficient to permit the jury to find that the amendment lacked consideration.

C. The Evidence That ISL Was Coerced Into Signing the Amendment.

At the trial ISL argued and presented evidence in support of its contention that the March 2 amendments to the contract were invalid because Kovar's signature was exacted by economic duress. That evidence, when taken as true and credible, was more than sufficient to permit the jury to find that ISL was coerced into agreeing to the amendment.

The evidence demonstrated that Plessey was well aware of two economic facts with respect to ISL which allowed Plessey to extort the March 2 amendments by threatening to destroy ISL by refusing to close. Those facts involved (1) the knowledge that ISL was virtually bankrupt and (2) the knowledge that the principal ISL shareholders had pledged their stock to secure a loan which was due and could not be paid.

1. Plessey's Knowledge of ISL's Financial Condition.

As soon as negotiations began, Plessey personnel traveled to Barbados to review ISL records and operations. It was immediately apparent that while ISL had substantial back orders and a product much in demand, because of cash flow problems ISL was unable to meet its current obligations. A report written

by Plessey's Osborne in December advised Plessey management of those facts (PX 10). In early January, 1970 Plessey's American Chairman, Sinsheimer, reported to the English Board as follows (PX 109):

> "Briefly, this company is in dire financial straights, it having at this time either no asset value or a negative net worth. It appears that this company needs an immediate infusion of $600,000 to continue in business."

Sinsheimer testified on cross-examination that he was fully-aware that ISL's financial condition was desperate (Tr. p. 950):

> "Q. By that time [February 19] you knew exactly how desperate ISL's financial condition was, did you not?
>
> A. Well, I knew that the situation in Barbados was desperate financially because Mr. Kovar had indicated that in order to have working capital until we closed this deal, he would have to sell the house, which he used as a residence, and I believe that we agreed to buy that house at the price that his purchaser was willing to pay in order to provide funds to keep the business going, even though we hadn't a contract to buy that house yet."

Similarly, Albert, Plessey's financial vice-president, admitted that Plessey knew full well that ISL was bankrupt and could stay in business until the March closing only if Plessey purchased the villa (Tr. pp. 1596, 1603). Albert stated (Tr. p. 1565):

> "Q. What was the purpose of that trip [to Barbados in February]?
>
> A. We had been notified that International Scientific Limited had run into a financial crisis, but they didn't have the funds with which to pay their payroll. The payroll for a month that they needed was approximately $84,000.
>
> We had not closed the transaction for them, and looking for some collateral for the $84,000 we agreed to take the house out of the corporate assets and buy the house for $84,000."

Finally, PX 11, a report to the English board by Crocker, dated February 25, 1970, stated at p. 2:

> ". . . The current financial position of I. S. L. is such that without the injection of additional working capital, the company will cease to operate as of end February 1970. Plessey Electronics Corporation in February transferred \$84,000 U. S. for the purchase of the house occupied by E. A. Kovar and owned by I. S. L., this cash is just sufficient to keep the company operating until March 2nd, 1970 proposed closing date."

2. Plessey's Knowledge of the Data 100 Loan.

The evidence showed that prior to entering into negotiations with Plessey, ISL had negotiated for sale of the company to Data 100. In connection with those negotiations, Data 100 loaned ISL \$200,000 which loan was secured by pledge of the stock of ISL's principle shareholders (Tr. pp. 81-2, 139-40). The evidence further demonstrated that the Data 100 loan was past due and Data 100 had several times threatened to seize and sell the pledged stock (Tr. p. 139). In February, Data 100 agreed to forego seizure of the stock on the representation that ISL was about to close the sale to Plessey and Plessey would advance funds to pay the loan (Tr. p. 140).

All the facts regarding the Data 100 loan were known to Plessey and thus Plessey was fully aware that if it refused to close the shareholders of ISL would forfeit their stock (Tr. pp. 139-40, 238-39, 554).

3. The Coercion.

The foregoing evidence establishes beyond question that when Albert and Dubin went to Barbados on March 2 to close and demand that the contract be amended, they went armed with the knowledge that if they refused to close, (1) ISL would on that day become bankrupt and (2) Data 100 would seize the stock and the principal stockholders and investors would be

wiped out. They also knew that it would be too late for ISL to resume negotiations with other potential acquirers, which negotiations had been broken off when the February 4 agreement was negotiated. In short, Plessey held ISL and its shareholders in a death-grip. The evidence showed that Albert and Dubin seized upon this death-grip to extort the March 2 amendments by the simple expedient of refusing to close unless ISL capitulated.

Lewis, ISL's attorney at the closing, repeatedly testified that Plessey demanded the amendments and when ISL balked, Albert and Dubin announced they would refuse to close and were leaving the room to call the bank to inform them that the deal was off and that therefore Plessey would not pay off the Data 100 loan against which Kovar's and other ISL stock was pledged (Tr. pp. 529, 561, 567, 570). Kovar similarly testified (Tr. p. 138). Even Albert admitted on cross-examination that he did not seek to negotiate the amendment, but rather that this was a "flat demand". (Tr. p. 1320.) Dubin conceded the same (Tr. p. 1304).

Faced with this demand and the death-grip held by Plessey, Kovar and Lewis had no choice but to sign the amendment. They both testified that Kovar signed only because of the coercion to which he was subject. Thus Kovar stated that he signed because "they had us over a barrel and I felt they were trying to stick it to us." (Tr. p. 138.) He also testified that because of the pressure he didn't feel he even had time to consult with the board because he couldn't take the risk that Plessey was bluffing (Tr. p. 351). Kovar concluded by stating at Tr. p. 736:

> "Q. You said in answer to one of Mr. Maloney's questions that you didn't feel you could risk calling Plessey's bluff. What did you mean by that and what would have been the situation?
>
> A. Well, if Plessey were not bluffing and we said no to their demands, it was my feeling that we would have a company without money, and the majority of the stock of

which was held by Data 100, namely, all of mine and Vic Johnson's and Van Bellingham. So we had a bankrupt company, a lawsuit, and no money, and not only were our personal investments involved, but those of a number of other people, and I didn't feel we could chance calling the bluff."

Lewis was equally specific. He testified that because of the economic pressure, Kovar had to sign (Tr. p. 531):

> "Q. You indicated in your testimony that you and Kovar resisted stoutly these requested amendments. What caused you to cave?
>
> A. The threat that Plessey would refuse to close, that the Data 100 loan pledge would be forcelosed, that we would, therefore, be left with a company that could not run without money, it was broke, and that the principal holders of shares in the company wouldn't even own the stock in it."

On cross-examination Lewis discussed his and Kovar's reaction to Plessey's demands (Tr. p. 575):

> "Q. What was the substance of your private discussion with Mr. Kovar?
>
> A. Well, we discussed whether Albert and Dubin were bluffing in their insistence on these amendments, and we concluded that we could not afford to call their bluff, because if they were not all we would have been left with was a bankrupt company and a lawsuit that we had no money to finance. So we decided we had to accede to their demands."

It has long been established in New York and elsewhere that "courts will not enforce an agreement in which one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury." *Nixon* v. *Leitman*, 32 Misc. 2d 461, 224 N. Y. S. 2d 448, 453 (St. Ct., 1962); *Lebin* v. *Nassau Savings and Loan Assn.*, 40 A. D. 2d 830, aff'd. 34 N. Y. 2d 671 (1974). More specifically, the law of economic duress in New York has

developed two concepts—business compulsion and duress of goods. See *First National Bank of Cincinnati* v. *Pepper,* 454 F. 2d 626 (2d Cir., 1972). Both are applicable here.

The legal concept of business compulsion provides, in essence, that where the normal legal remedy for breach of contract is inadequate or meaningless, the threat of breach of contract to extort amendatory concessions constitutes economic duress which renders the contract unenforceable. See e.g., *Equity Funding Corporation* v. *Carol Management Corp.,* 66 Misc. 2d 1020, 322 N. Y. S. 2d 965, aff'd, 37 App. Div. 2d 1047, 326 N. Y. S. 2d 384 (S. Ct., 1971); *Austin Instrument Inc.* v. *Loral Corp.,* 29 N. Y. S. 2d 124, 324 N. Y. S. 2d 22, 272 N. E. 2d 533 (1971); *Gallagher Switchboard Corp.* v. *Heckler Elec. Co.,* 34 Misc. 2d 256, 229 N. Y. S. 2d 623 (S. Ct. 1959); and *Manno* v. *Mutual Benefit Health and Accident Assn.,* 18 Misc. 2d 80, 187 N. Y. S. 2d 709 (1959). That is precisely the situation here. Plessey knew that if it threatened to refuse to close, ISL had no choice but to agree to any demand made by Plessey. Failure to agree meant that ISL would face immediate bankruptcy and that its principal stockholders would suffer huge personal losses. In the circumstances, a suit for breach of contract was meaningless. ISL had value principally as a going concern. If the sale to Plessey were not consummated, the assets of a bankrupt ISL would be of relative nominal value. The length of time and the costs involved in suing made that an ineffectual remedy.[3] The only alternative was to accede to Plessey's demand thereby preserving the opportunity of receiving a substantial amount for the going concern value of the company and of preventing huge personal losses. As Mr.

3. Common to the cases cited above, see e.g., *Gallagher,* was the fact that while the extorted party had a cause of action for breach of contract, the staggering losses which would be immediately incurred when weighed against the mere possibility of recovery at a much later date rendered the cause of action meaningless. *Lebin* v. *Nassau Savings & Loan Assn.,* 34 N. Y. S. 2d 671, 40 App. Div. 2d 830.

Justice Holmes observed in *Union Pac. R. R. Co.* v. *Publ. Service Comm.*, 248 U. S. 67, 70 (1918), "it always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

The companion concept to economic duress, duress of goods, is also applicable to the facts presented here. That concept establishes that where goods or funds rightfully due one party are wrongfully withheld in order to extort additional agreement, and such withholding will cause irreparable harm, the agreement extorted will be unenforceable. *First National Bank of Cincinnati* v. *Pepper, supra; Hellanic Lines Ltd.* v. *Louis Dreyfus Corp.*, 249 F. Supp. 526 (S. D. N. Y., 1966), aff'd. 372 F. 2d 753 (2d Cir., 1966); *Weiner* v. *Tele King Corp.*, 123 N. Y. S. 2d 101 (1953). Here Plessey contracted on February 4 to provide $600,000 to ISL. Plessey knew that the very existence of ISL depended upon receipt of those funds by March and that the stockholders would forfeit their stock if the funds were not provided. Plessey thereupon refused the funds unless ISL agreed to the March 2 amendment. The facts are essentially identical to those in *Weiner, supra.*, where a party who had sold goods to another party and would be irreparably injured unless payment was promptly made was forced to agree to a concession under threat of refusal to pay. The Court held that one who is "rightfully entitled" to money and from whom that money is withheld in order to extort agreement may treat that agreement as voidable because exacted under duress of goods. Here, of course, ISL was rightfully entitled to the $600,000 pursuant to the February 4 contract and Plessey's refusal to close in order to extort the amendment constituted duress of goods under New York law. Given the evidence outlined earlier, the jury should have been permitted to find that the amendment was unenforceable.

D. The Effect of Withdrawing the Validity of the Amendment Issue from the Jury.

The discussion above with respect to the evidence presented by plaintiff in support of its contention that the March 2 amendment was invalid demonstrates quite convincingly, we submit, that the trial judge erred in refusing to permit the jury to perform its fact finding function. On each of the three arguments presented by plaintiff, the jury could have, and, indeed we believe would have, found the amendment invalid. Equally important, however, is the fact that in charging the jury that the amendment was valid, the judge seriously weakened plaintiff's entire case.

Each of the arguments involving the amendment presented instances of direct conflict in testimony between Kovar and Lewis, on the one hand, and Sinsheimer, Dubin and Albert on the other. By instructing the jury that the amendment was valid, the court in effect told the jury that Plessey's witnesses were credible and plaintiff's were not. Obviously, the credibility of Plessey's witnesses was the key to plaintiff's case. Thus plaintiff was irreparably harmed by the directed verdict.

Moreover, as appears from the opening statement of counsel and evidence previously discussed, plaintiff's case was built on the alleged invalidity of the March 2 amendment. This was plaintiff's primary position because, as even Plessey conceded, if the March 2 amendment was invalid on any of the grounds asserted, then the management takeover by Plessey was premature and in breach of the contract. The directed verdict on this issue told the jury in effect that plaintiff's primary contentions had been rejected by the court, thereby infecting the credibility of its entire case. No amount of cautionary instructions to the jury could cure this prejudice to plaintiff's case.

Finally, if the issue of the validity of the March 2 amendment had been presented to the jury, the entire picture of fraud and misrepresentation might well have been viewed by the jury in a

different light. For example, if the March 2 amendment were coerced, and therefore invalid, the motive for such coercion would come into focus. Plessey knew that ISL would become profitable in May or June, and would be averaging $15,000 monthly profits by July (PX 10). Only by shortening the period could it more assuredly pursue its fraudulent intent to take over ISL and put the pieces into its prior (1969 Matrix) plan.

Plessey previously had been unable to penetrate the U. S. market (Tr. p. 1023). ISL had approximately twenty-five customers in the United States and Canada including such firms as IBM, Honeywell and Hewlett-Packard (Tr. p. 83, PX 55). For $180,000, Plessey could take over ISL, its customers and trained work force, and destroy ISL as a viable, profit-making business entity by the simple expedient of taking early control, thereby avoiding any further payout under the contract. The blatant nature of the fraudulent scheme became diffused with the court's direction that the March 2 amendment was valid. This direction undercut plaintiff's entire case.

II.

THE JURY'S VERDICT THAT PLESSEY'S TAKEOVER WAS NOT PREMATURE WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Plessey assumed management control of ISL on June 9 pursuant to amended paragraph 5(d) of the February 4 contract of sale. As amended, paragraph 5(d) provided in pertinent part (PX 5):

> ". . . [I]f the profits of ISL *commencing* May 1, 1970 (crediting to the month of May the net profits of the 2-month period comprised of March and April, 1970, but not charging any net loss for that period) *average* less than $15,000 per month, or if there have been three consecutive months of losses during that measuring year *(excluding the*

first two months thereof), this sub-paragraph shall no longer apply and Plessey shall have the right to assume full management responsibilities." (Emphasis supplied.)

The clear, unambiguous language of paragraph 5(d) provides that commencing May 1, 1970, ISL must average $15,000 per month profit. Since "average" is defined as the arithmetical mean between two extremes, it is impossible to average a specified monthly sum in one month. Therefore, 5(d) provided ISL management a two month period commencing May 1 to average $15,000 per month. Under no circumstances could Plessey assume control until the May and June profit results were known. The takeover on June 9 was thus a blatant breach of paragraph 5(d). The jury's negative response to special interrogatory No. 1: "Did Plessey breach paragraph 5(d) of the contract as amended . . . by assuming management control on June 9, 1970" is clearly contrary to the weight of the evidence.

The evidence presented at trial with respect to the meaning of the word "average" in paragraph 5(d) left no reasonable doubt that Plessey's takeover after only one month was wrongful. First, the uncontradicted history of the negotiation of paragraph 5(d) establishes that the word "average" afforded ISL two months to earn the required profits. The original draft of the contract, prepared by Plessey, allowed Plessey to assume management control upon closing (PX 1, p. 1). ISL objected to this provision and insisted that ISL management be permitted to retain operating control during the measuring year. Plessey argued that it was not content to allow ISL to sustain continuing losses during that year. ISL contended that it would take at least three months before the business began to show a profit and it did not want to be ousted during that period. Plessey agreed and consented to a provision which, in effect, granted ISL the first three months after closing to turn the company around. In addition, Lewis, ISL's attorney, demanded that ISL be given some time after the three month period ended to attain $15,000 monthly profits—the benchmark established by Plessey.

As a result, Lewis suggested language which would allow ISL to "average" $15,000 monthly profits commencing with the third calendar month after closing (Tr. pp. 521-522). Dubin, Plessey's attorney, telexed that language to Sinsheimer in London (PX 6). Sinsheimer cabled back language which deleted the word "average" and required ISL to earn $15,000 "per month" commencing with the third month after closing (June) (PX 7). That language appeared in the second draft of the contract (PX 2, par. 5(d)).

Kovar, Lewis and ISL's board all objected to deletion of the averaging concept (Tr. pp. 117, 290, 308-9, 455-58, 522-3). Further negotiations were conducted and the word "average" was once again included, appearing in paragraph 5(d) of the February 4 contract (PX 3; Tr. pp. 523, 542). That language later proved to contain an unwanted double negative and was amended by agreement dated February 18, 1970 (PX 4):

> ". . . Notwithstanding the foregoing, if ISL profits commencing with the third calendar month of the measuring year average less than Fifteen Thousand ($15,000) U. S. Dollars per month or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof), this subparagraph shall no longer apply and PLESSEY shall have the right to assume full management responsibilities. . . ."

Thus, the final agreement allowed ISL a three month grace period during which it was to turn the business around, and a period thereafter to "average" $15,000 monthly profits. The overwhelming weight of the evidence establishes that the averaging provision granted ISL at least two months after the three month period to earn $15,000 monthly profits.

Kovar repeatedly testified that the purpose of the averaging provision was to afford ISL the months of June and July to achieve monthly profits of $15,000 (Tr. pp. 116, 119, 144, 290, 307-09, 714). He testified that after preparation of the second draft, which contained Sinsheimer's language deleting the

averaging provision, a board meeting was held on January 30. There Kovar explained that Lewis had thought he had secured Plessey's agreement to an averaging provision (Tr. p. 307). The board instructed him not to sign the contract unless such a provision appeared (Tr. pp. 117, 308-09, 312-13). Carlen's testimony fully supported Kovar's. He stated that the board knew the company would be unable to earn $15,000 profits in June and more time, to be gained by means of the averaging provision, was necessary (Tr. pp. 455-58, 461-62). Lewis similarly testified, stating that after the board meeting he was instructed to negotiate to include the averaging concept (Tr. pp. 523, 542).

Kovar and Lewis each testified that "average" meant that ISL had two months commencing the third full calendar month after closing to earn a total of $30,000 profits; that is, to average $15,000 monthly profits. Kovar replied to the court's question (Tr. p. 116):

> "What does that mean to you?
> The Witness: It meant to me that Mr. Dubin had put in—revised the contract, pursuant to our request, that rather than the profit minimum being $15,000 in the third month, that the test would be an averaging of $15,000 per month commencing with the third month and that after I received this copy of the second draft—
> The Court: As I understand what you are saying, it is if the third month, say, was 5,000, there wasn't anything to average because there was just one month, is that right?
> The Witness: That is right.
> The Court: You say it went on for another month?
> The Witness: Correct.
> The Court: That is what you thought it meant?
> The Witness: Yes."

Similarly, Kovar testified (Tr. p. 119):

> Q. But what was your understanding as to the period of time you had to make average profits of $15,000 under Paragraph 5d as corrected by Plaintiff's Exhibit 4?

A. To me it meant that we had to June and July to average $15,000 per month and to the profit picture we could add anything that might have been made during April or May, highly unlikely as that would have been.

The Court: You just testified a minute ago that you didn't have to average because you had two months. That is your point?

The Witness: Yes, sir.

The Court: You say there was nothing to average until you had two months?

The Witness: That is correct."

Lewis stated that Paragraph 5(d) granted ISL at least two months (Tr. pp. 524-25). Again, on cross-examination Lewis testified to the two month average provision (Tr. pp. 540-41):

"Q. In connection with preparing that language, what did you say to Mr. Dubin and what did he say to you concerning what the language was intended to mean?

A. Which language are we talking about, the whole paragraph?

Q. Let's just take the third sentence, the next to the last sentence concerning the $15,000 profit.

A. It was intended to mean that once the first two-month period had passed, during which losses were not to count, although profits were, existing management of ISL had a right to try over an initial two-month period and then thereafter, if they were successful in that two-month period, to earn an average of $15,000 per month. As long as they maintained that average they kept management control of the company throughout the measuring year.

Q. Did you say that to Mr. Dubin?

A. Oh, I am sure that we talked about various examples of how it would work out, yes.

Q. It is your recollection that you specifically discussed with Mr. Dubin that this would give the company the right to average profits in June and July?

A. Yes."

Similar testimony appears at Tr. p. 579.

Carlen also testified repeatedly that he understood "average" to mean a two month period (Tr. pp. 451-52, 455-58, 461-62,

467, 469-70, 491-92, 504, 506, 509). Moreover, the proxy material sent out by Carlen to approve the sale before the contract was ever signed is a contemporaneous construction which demonstrates that ISL thought "average" granted them a period of longer than one month to earn profits (PX 9, Tr. p. 421). In addition, when Carlen first was told of the March 2 amendments, he asked Kovar how it was possible for Plessey to assume control after only one month's operation (Tr. pp. 422-23, 484, 505). He testified that at the July 13 meeting with Sinsheimer he told Sinsheimer that the takeover was premature because ISL had not been allowed to average profits (Tr. p. 509).

In the face of this overwhelming testimony that the word "average" in paragraph 5(d) meant that ISL had two months to earn $15,000 monthly profits, Plessey offered some token testimony which was so conflicting as to be inherently incredible. Sinsheimer attempted to avoid the universally accepted meaning of the word "average" by first stating that regardless of what it might normally mean, he had instructed Dubin to require ISL to begin earning $15,000 profits per month commencing the third calendar month after closing (Tr. p. 974). Of course, his instructions are irrelevant because regardless of what he might have desired, the contract permitted ISL to "average" profits. If Sinsheimer had wanted ISL to earn $15,000 per month, every month, he could have so provided. Indeed, PX 7, Sinsheimer's draft of paragraph 5(d) which appeared in the second draft (PX 2) clearly stated precisely that—"if ISL profits are not at least Fifteen Thousand ($15,000) U. S. Dollars per month in any full month." His contention that when that language was changed to include the word "average" it still meant $15,000 per month, every month, is entirely incredible.

Judge Bonsal agreed. After the above testimony he asked Sinsheimer the following questions (Tr. pp. 974-75):

> "A. It is my position that I instructed the draftsman to allow me to take over the business if they did not make $15,000.

The Court: That is not the question. Don't read it as a lawyer . . .

The Witness: Your Honor, I don't think that I can interpret a word without reference to why the word got in there, how it got in there, and the antecedents of the discussion leading to it.

The Court: In other words, you have a special interpretation of "average"?

The Witness: No, sir. If Hank Aaron gets up in the first inning and hits a home run and has not another hit after that, his average is 1,000.

The Court: Suppose Aaron was told that beginning May 1st if he averages less than five home runs per month he is going to be cut?

The Witness: I believe he would have to hit five in May.

The Court: You think then if he hadn't hit five in May, although he might hit ten in June that would not do it?

The Witness: Yes, sir."

After this exchange Sinsheimer changed his testimony and told the court that he interpreted "average" to mean "at the rate of" (Tr. p. 975). Next, Sinsheimer admitted that PX 7, his draft of paragraph 5(d) which appeared in the second draft of the contract (PX 2), required that ISL earn $15,000 every month and that meant "no averaging of any kind" (Tr. p. 1014). At this point Sinsheimer apparently realized that he had been caught in a fatal contradiction. On the one hand, he had testified that his draft, which did not contain the word "average", required ISL to make $15,000 every month and "no averaging of any kind" was involved. On the one hand, he had told the judge that the contract, which did include the word "average", also required ISL to make $15,000 every month because "average" meant "at the rate of". This construction, of course, read "average" out of the contract. To save himself, Sinsheimer then invented a new construction which attempted to give meaning to the word "average". He testified that "average" referred only to those months after

the first month. Thus, while ISL was required to earn $15,000 in the third calendar month, thereafter it had only to average $15,000 a month (Tr. p. 1017). Judge Bonsal was again incredulous (Tr. p. 1018). Sinsheimer stuck with his new story (Tr. pp. 1030-31):

> "The Court: So when you see the word average here, you say average applies after the third calendar month; is that right?
>
> The Witness: Yes sir.
>
> The Court: It doesn't apply to the third calendar month?
>
> The Witness: No, sir.
>
> The Court: Is that right; that was your interpretation?
>
> The Witness: That is my interpretation, and that is what I intended to convey to my draftsman.
>
> The Court: I see."

Plessey's only other evidence with respect to the meaning of "average" was the testimony of Dubin. It was even weaker than Sinsheimer's. He too first admitted that PX 7 which did not include the word "average" required ISL to earn $15,000 every month (Tr. p. 1281). He then also read "average" out of the contract by stating that even though the word did appear in the final draft, the language still meant that ISL was required to earn $15,000 every month (Tr. p. 1307). Judge Bonsal remained unconvinced (Tr. p. 1320):

> "The Court: All right, your point is that you average one month?
>
> The Witness: That's right.
>
> The Court: If it is two months, then you are averaging two months?
>
> The Witness: Then you are averaging two, and so on."

Plessey presented no other evidence in support of its interpretation of paragraph 5(d). We submit that based on the contract language and ISL's evidence, and the weak and contradictory evidence presented by Plessey, the jury's verdict that Plessey's takeover after only one month was valid was contrary to the weight of the evidence and cannot stand.

It is a cardinal principle of contract construction that a contract will not be given a construction which renders meaningless certain of the words employed. 4 *Williston On Contracts* (3rd Ed.), § 618; *Fleischer* v. *W. P. I. X. Inc.*, 30 Misc. 2d 17, 213 N. Y. S. 2d 632 (S. Ct., 1961). Plessey's construction, accepted by the jury, does precisely that. As discussed above Sinsheimer and Dubin simply read "average" out of the contract. Moreover, Plessey argued that ISL had to make $15,000 profits in May. Yet, paragraph 5(d), as amended, and as written by Plessey, provided that the first two months of the measuring year, April and May, were to be excluded in determining whether ISL has three consecutive months of losses.[4] Thus, unquestionably, the losses provision of 5(d) permitted ISL to sustain losses in May and yet retain control. If the profits provision of 5(d) is read as Plessey contended, it would not only not permit any losses in May but would require at least $15,000 profit. This reading renders the provision permitting losses in May meaningless. A construction containing inherently contradictory terms should not be allowed to stand.

ISL's construction, on the other hand, gives consistent meaning to both the profits and the losses sections of paragraph 5(d). That construction would require ISL to average $15,000 monthly profits for two months—May and June. Thus ISL could sustain a loss in May, as it clearly contemplated by the losses exclusion, make a $30,000 or greater profit in June, and still "average" $15,000 monthly profits for May and June. This internally consistent construction of 5(d) is clearly correct and should not be discarded for a construction which is inherently inconsistent and which renders meaningless one-half the paragraph.

It is apparent from a thoughtful examination of the evidence, that the jury either misunderstood the testimony or decided the

4. "[I]f there have been *three consecutive months of losses during that measuring year (excluding the first two months thereof)*" (Emphasis supplied).

matter contrary to the overwhelming weight of the evidence. This Court should overturn that verdict and award ISL a new trial.

III.

THE JURY'S VERDICT THAT PLESSEY DID NOT BREACH THE CONTRACT BY FAILING TO CONTINUE THE BUSINESS OF ISL IN GOOD FAITH DURING THE MEASURING YEAR WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The contract between ISL and Plessey expressly provided that if Plessey assumed management during the measuring year it would be required to operate the business in good faith so as to allow the assets purchased to generate profits for ISL. When Plessey did assume control, one of its first acts was to discontinue cable harness and assembly work which was expressly set out as one of the principal assets of ISL. Discontinuance of this work was, in and of itself, a blatant breach of the contract and the jury's verdict against plaintiff on this issue was directly contrary to all the evidence.

Paragraph 5 of the February 4 agreement expressly sets out Plessey's obligation, in the event of a takeover, to continue the business of ISL during the measuring year in good faith. That paragraph provides in pertinent part (PX 3):

> "Paragraph 6 hereof provides that ISL will be entitled to certain additional money depending upon the amount of profits derived from the assets being acquired hereby during the year commencing on the first day of the first calendar month after closing (hereinafter called 'the measuring year'). In order to allow those assets to generate profits during the measuring year, Plessey hereby agrees that for that period it will:
>
> > b. Continue ISL's business in good faith, itself or through a subsidiary,
> >
> > d. . . . In such event, [a Plessey takeover] however, Plessey shall be obligated to continue the business of ISL during the measuring year in good faith."

The foregoing language clearly imposes an express duty on Plessey to operate the business so as to allow the ISL assets it was purchasing "to generate profits during the measuring year." The generation of those profits is specifically tied to "certain additional money depending upon the amount of profits" due ISL. Thus, when Plessey "hereby agrees" to "b. Continue ISL's business in good faith", the good faith unquestionably refers to the generation of profits which will entitle ISL to certain additional money. Just as clearly, Plessey's undertaking in paragraph 5(d) "to continue the business of ISL during the measuring year in good faith" is the same "good faith" referred to in paragraph 5(b) which, in turn, refers to the generation of profits in order to pay ISL certain additional money.

The word "profit", in turn, is defined in Paragraph 6 of the contract (PX 3, par. 6):

> " 'Profit' as used in this paragraph 6 and in paragraph 5 is intended to and shall include only income or losses (before any taxes measured by income) actually generated by deployment of the assets of ISL such deployment being principally in the manufacture and sale of memory planes and memory stacks, cable harnesses and other electrical assemblies, and shall not include income or losses resulting from changes in accounting methods, practices or procedures."

Clearly, the assets of ISL which Plessey is obligated to manage in good faith in order to generate profits include "cable harnesses and other electrical assemblies." Significantly, that language was not merely included as a general definition. It did not appear in the first (PX 1) or second (PX 2) drafts of the contract. In the second draft, paragraph 6 defined ISL assets as limited to "the manufacture and sale of memory planes and memory stacks." Julius Lewis, ISL's attorney, specifically demanded that the final agreement define assets from which profits were to be generated to include "cable harnesses and other electrical assemblies." (Tr. pp. 523, 990, 992.) Kovar testified

that cable harnesses were an important aspect of ISL's operations (Tr. pp. 63, 192).

Notwithstanding the express contract language and the history of the negotiations which indicated the importance of cable harness work to ISL's business, within one month after takeover, Plessey dismantled and discontinued all cable harness work (Tr. pp. 785, 1116). Plessey's action, quite simply, was not permissible under the terms of the contract on any grounds and the jury's verdict that discontinuance of cable harness work did not constitute a breach of the contract cannot stand.

The only evidence presented by Plessey with respect to discontinuance of cable harness work was clearly insufficient to support Plessey's action. Plessey's Clarke testified that cable harness work was discontinued because it was unprofitable (Tr. p. 1116). Clarke stated that this decision was made by Peter Hewitt who at the time was managing the ISL operation for Plessey. Plessey presented no other significant testimony in support of its alleged right to discontinue the cable harness business. More importantly, plaintiff flew Hewitt, who has since left Plessey, from England for its rebuttal case. Hewitt specifically denied that he had advised Plessey to discontinue the cable harness business or that the business was unprofitable (Tr. p. 1633). In addition, plaintiff offered substantial testimony that it had a number of cable harness orders and, indeed, that there existed a $1,000,000 cable harness potential (PX 55, Tr. pp. 193, 591-92, 785-86, 790, 797, 885-86). On the basis of the foregoing evidence, the jury's verdict on special interrogatory No. 2 was against the weight of the evidence.

IV.

THE JURY'S VERDICT AGAINST PLAINTIFF WITH RESPECT TO PLAINTIFF'S CLAIM THAT PLESSEY NEVER HAD ANY INTENTION OF PERMITTING ISL TO MANAGE THE BUSINESS WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

ISL contended at trial that it had been defrauded because Plessey never intended to permit ISL to manage the business during the measuring year. It was plaintiff's contention that from the outset of negotiations, Plessey intended to assume control of ISL and immediately integrate ISL's operations into Plessey's already existing Matrix Plan to penetrate the United States memory market. The evidence presented proved these contentions beyond peradventure and required the jury to find for ISL.

In 1969 Plessey developed a "Matrix U. S. A. Plan" which was a scenario of its intentions with respect to the U. S. market (PX 71). A portion of that plan contemplated that Plessey would supply the U. S. memory market from an offshore facility. The plan further provided that this facility would be an assembly operation similar to Plessey's Lisbon and Malta operations. Sales and engineering responsibility would be vested in a facility to be established in the Boston area. Both facilities would become part of Plessey's multi-national organization.

Soon after the Matrix Plan was approved in September, 1969, the desire of ISL to sell its memory business in Barbados came to Plessey's attention. Plessey quickly determined that purchase of ISL with its established customers and product afforded a unique opportunity to achieve the goals outlined in the Matrix Plan in a fraction of the time allotted (Tr. pp. 932-33, 943, 946, 951-53, PX 109, PX 11[illegible]). The evidence demonstrated that from that moment on Plessey's purpose was to seize control of ISL as soon as possible in order to begin implementation of the Matrix Plan.

Plessey's initial step in its effort to gain control of ISL was the insertion, in the January 16 first draft of the contract, of the provision that Plessey would operate the business during the measuring year (PX 1). When ISL refused to sell on that condition, Plessey agreed on paper to permit ISL to remain in control but actually commenced steps which would allow Plessey to seize control almost immediately.

First, Plessey insisted that if ISL did not earn at least $15,000 in the third month of the measuring year (June), then Plessey could assume control (PX 2). As we have seen, upon ISL's insistence that provision was rewritten to provide for $15,000 a month *average* profits commencing with June. Next, at the closing on March 2, with full knowledge of ISL's desperate financial condition, Plessey coerced the amendment which provided that ISL had to average $15,000 a month profits commencing in May. This amendment resulted because by March it had become apparent to Plessey that by June ISL would achieve the designated profits and thus Plessey could not take control under the contract (PX 111). Indeed, according to one report it was envisioned that ISL would be at breakeven by the end of April on sales of $135,000 (PX 10). In fact, for the month of May ISL had profits of $6,200 on sales of $142,000. In short, Plessey knew that with the infusion of the agreed upon cash ($600,000) and the orders in hand it was likely ISL would make $15,000 or more in the month of June thereby preventing a takeover of management by Plessey and thus necessitating the blackjack tactics by Albert and Dubin to force Kovar to agree to shortening the period to commencing with May.

Plessey's intention to immediately integrate ISL into its overall operation is further evidenced by a series of actions taken between February and the June 9 takeover. First, in February Plessey's Crocker visited ISL. His report to the Plessey board (PX 11) makes it clear that Plessey intended to take over management of ISL from the beginning; that Kovar at best was to be a temporary "acting General Manager"; that it was con-

templated that he would be removed *during* the measuring year and replaced by a Plessey man; and that Plessey intended an immediate reorganization of ISL consistent with the September, 1969 Matrix Plan for the U. S. A. This plan contemplated making the Barbados facility into essentially an assembly type operation (similar to Lisbon and Malta) and transferring marketing, design, testing and repair functions to the U. S. under Plessey Electronics. This, of course, is what Plessey did after the management takeover and during the measuring year. Thus Crocker's report states (PX 11):

"MEMORY STACKS U. S. A.

A Matrix U. S. A. Plan was put before the Board in September, 1969. Since that time an opportunity has arisen to purchase a Barbados based Core Weaving, Assembly and Engineering Company known as International Scientific Limited, with an existing agency sales force in the United States.

The objective of this report is to propose the integration of International Scientific Limited with the Matrix U. S. A. Business Plan to form a virtually independent and total facility in the Core Memory Stack Business, the proposal does not include the manufacture of Ferrite Coes.

The objective will be as the U. S. A./Matrix plan, namely to achieve a penetration of 5% of the available U. S. A. Memory Stack market, i.e., sales of over 2,000,-000 in 1973/74. The acquisition of International Scientific Limited will provide us with an opportunity to reach our original target more quickly."

* * * * *

"THE PROPOSED RE-ORGANIZATION

The Memory Division of Plessey Inc. will be under the direction of a General Manager controlling both the Long Island and Barbados operations. In view of the nature of the contract with I.S.L. it is proposed that Mr. A. Kovar

be made *acting General Manager with a clear understanding that during the first twelve months a permanent and more competent General Manager be appointed at any time*. The Long Island facility will be run by a Marketing Manager responsible for the direction of the Agents and the building up a minimal in house sales force. He will also control a customer engineering capability covering Test, Repair, Service, and Outline Design. It is suggested that Mr. A. Kovar continue to be resident in Barbados since it is in this area that his expertise and local knowledge will be of more use. The Barbados facility will continue to cover detailed design for Manufacture, Manufacturing, Engineering, Production and Accounts (Emphasis supplied).

Peter Hewitt, currently Manager of our Portuguese operation will be seconded to Barbados to assume control of manufacture for a minimum period of six months.

* * * * *

NOTE

This Business plan should be read in conjunction with the Report on the Proposed Acquisition of I.S.L. Seawell Barbados by Plessey Incorporated attached, together with the Matrix U. S. A. Business plan published on 26th September, 1969, copies of which are also attached."

Crocker's report was implemented when Hewitt was transferred to Barbados to take over production in early March. The Plessey takeover was further implemented by the employment of Parr as marketing manager. Without prior consultation with Kovar, at Crocker's suggestion, Parr was offered the job. Indeed, negotiations with Parr were commenced some time in March. Obviously it was contemplated that Parr, not Kovar, would be in charge of ISL sales representatives and would be vested with pricing authority.

Second, early in May, Plessey disseminated an "Integrated World Memory Business Plan". (PX 72.) That plan stated, in part:

"The recent establishment of the U. S. Memory Division forms the basis of the plans for the U. S. A. With the recent acquisition of ISL in Barbados advancing these plans considerably. The decision has already been taken to establish a marketing, engineering and service facility in the Boston area, and before very long a marketing and engineering facility will also be established on the West Coast."

PX 72 was a printed document prepared before the May 8 date it bears (Tr. p. 1000). Notwithstanding the fact that Plessey had formulated plans to move all but assembly operations to Boston, on May 8 and 9 Clarke met with Kovar and asked his permission to make the change. Kovar, who knew nothing of PX 72, refused on the ground that his duty was to maintain ISL intact in order to earn the payout (Tr. pp. 156, 159-160, 1086-87). Clarke grew angry and informed Kovar that Kovar had a conflict of interest. Obviously, Plessey was intent upon implementing its Matrix Plan. If Kovar would go along, contrary to the best interests of ISL, fine; if not, Kovar would have to be fired.

When Clarke realized Kovar would not rubber stamp the Plessey changes, steps were immediately taken to remove him. Meetings were held in England on May 20 and May 22. Clarke's report of those meetings demonstrates that Plessey would remove Kovar regardless of May profit results. That memo stated, in part (PX 20):

"ACTION ARISING OUT OF MEETINGS HELD AT TOWCESTER MAY 20TH AND STROWGER HOUSE, MAY 22, 1970.

Mr. D. Gretton is to join International Scientific (1970) Ltd, as Manager in Charge of Operations. . . .

2. The date of the takeover from Allan Kovar should be as early in June as possible and this date will be dependent upon arrangements to be made by W. J. Sinsheimer. Gretton and other people involved in the takeover will be available for movement effective June 7, 1970. . . .

10. D. G. Clarke to advise N. Crocker of the date for the above plan to be put into effect, as soon as this date has been agreed by W. J. Sinsheimer, the intention being for the takeover group to arrive at the Barbados plant the day following dismissal of Allan Kovar."

Third, on June 1 Clarke prepared another memo (PX 21) stating:

> "All that now has to be agreed is the actual date that this exercise takes place and I will be in touch with you in this regard as soon as the necessary arrangements have been finalized."

Finally, on June 4 Clarke wrote still another memo to Sinsheimer (PX 112):

> "He [Kovar] informed me that the total May sales were approximately $144,000 and that he hoped to have available by Monday of next week the profit for the month of May. I would suggest that should these figures be available that you decide the course of action you intend to take with Allan Kovar and that this matter be resolved with yourself and he before Kovar returns to Barbados. On this basis it would then be possible for me to arrange for Norman Crocker to make available his team from Portugal and Towcester, and for me to arrange that Frank Parr arrives in Barbados on the same date as Gretton, Sweeney and Lewis, this preferably to be the date following the dismissal of Allan Kovar."

This memo shows that Plessey knew that ISL would be profitable in May ($144,000 sales when break-even was $135,000) and still intended to remove Kovar and replace him with the Plessey team.

On June 9 the takeover was effected. Kovar was fired and the Plessey plans made as early as September, 1969 and reiterated in February (PX 20) and again in May (PX 72), (PX 20) and June (PX 21), (PX 112) were implemented. A management team was dispatched to Barbados and the business

was restructured precisely as in Clarke's May 25 memorandum and Plessey's 1969 Matrix Plan (PX 20, PX 71).

The foregoing establishes overwhelmingly that from the outset Plessey never intended to honor the contract. It simply bought the company and in blatant breach of the contract duties restructured it precisely as it desired. The jury's verdict that Plessey's action was permissible is without foundation and should be set aside.

V.

THE COURT ERRED IN AWARDING COSTS TO PLESSEY BECAUSE PLESSEY WAS NOT THE PREVAILING PARTY.

After trial, pursuant to Rule 54(d), defendant moved to tax the plaintiff with costs in the amount of $11,366.60. The Clerk disallowed costs for daily transcript and reduced costs for witnesses. Plaintiffs were taxed costs of $1,918.00 for depositions and $1,563.40 for witnesses. Judge Bonsal upheld the Clerk's order. Both plaintiff and defendant have appealed from the amount taxed.

Plessey is not entitled to recover costs because it was not the prevailing party. Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Here, plaintiff sued defendant on several counts for compensatory damages of $1,260,000 plus punitive damages. Defendant counterclaimed for compensatory damages of $3,000,000 plus punitive damages. The jury returned a verdict denying any relief to either party.

Where both complaint and counterclaim have been rejected by the trier of the facts, the courts have generally held that neither party is deemed to have "prevailed" for Rule 54(d) purposes. *Magee* v. *McNany*, 11 F. R. D. 592 (W. D. Pa. 1951); *Armour & Co.* v. *Nard*, 463 F. 2d 8 (8th Cir. 1972), cf. *Sheaves* v. *Estrela Corp.*, 175 F. Supp. 184 (D. C. Mass. 1959). Such has long been the rule in the Second Circuit. In *Srybnik* v. *Epstein*, 230 F. 2d 683 (1956), the Court of Appeals denied

costs to both parties where plaintiff had sued defendant for $3,850, and defendant had counterclaimed for $123,500, both claims arising out of alleged breach of warranty on the same contract. Writing for a unanimous bench, Judge Lumbard declared:

> "In case such as this where the defendant counterclaims for affirmative relief and neither party prevails on its claim, it is quite appropriate to deny costs to both parties, as was done in Magee v. McNany . . ." (230 F. 2d at p. 686)

See also *Hohensee* v. *Basalyga,* 50 F. R. D. 230, 232 (M. D. Pa., 1969):

> "Where neither party prevails it is appropriate to deny costs to both parties. . . ."

CONCLUSION.

For each of the foregoing reasons, Plaintiff-Appellant, Scientific Holding Company, Ltd., respectfully prays that the District Court's direction of a verdict for defendant with respect to the validity of the March 2 amendments be reversed, that the jury's verdict be overturned and that plaintiff be awarded a new trial as to all issues.

Respectfully submitted,

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STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. W. Langbauer ..... being first duly sworn, deposes and says that he served ..two.... copies of the Brief ....

....

in the above entitled cause, as per statute herein made and provided, on

Mr. James J. Maloney
Rogers & Wells
Pan Am Building
200 Park Avenue
New York, New York 10017

this ....22nd.. day of ....July....., A. D. 19.74.

W. Langbauer ....

Subscribed and sworn to before me this ..22nd....

day of ....July..., A. D. 19.74.

Leonard P. Henstron ....

Notary Public.